84-307

NO. ____

Office Supreme Court, U.S.
FILED
AUG 28 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SOUTHERN BANCORPORATION, INC.
AND ITS SUBSIDIARIES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert H. Hishon
M. Celeste Pickron
Bondurant, Miller, Hishon & Stephenson
2200 1st Atlanta Tower
Two Peachtree Street
Atlanta, GA
30383-4501
(404) 581-5200

Francis Marion
Anne S. Ellefson
Haynesworth, Perry Bryant, Marion & Johnstone
409 East North St.
Greenville, SC
29602
(803) 271-7970

August 28, 1984

42 pp

QUESTIONS PRESENTED

Whether a Court of Appeals, in reviewing a determination of the fair market value of an asset for federal income tax purposes, may substitute its judgment of the credibility of witnesses and the weight of the evidence for that of the District Court.

Whether, in evaluating the evidence, the nonadjudicatory determination of an administrative agency, the Internal Revenue Service, is to be given more weight than the factual findings of a United States District Court judge.

INTERESTED PARTIES

The following persons have an interest in the outcome of this case:

Southern Bancorporation, Inc. and Subsidiares (Petitioner)

United States of America (Respondent).

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
INTERESTED PARTIES	i
OPINION BELOW	1
JURISDICTION	2
FEDERAL RULE OF CIVIL PROCEDURE INVOLVED	2
STATEMENT OF THE CASE	4
ARGUMENT	
I. THE DECISION OF THE FOURTH CIRCUIT THREATENS THE ROLE OF THE DISTRICT COURT AS THE JUDGE OF THE CREDITABILITY OF WITNESSES AND THE WEIGHT OF THE EVIDENCE	14
II. THE DECISION OF THE FOURTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS	23
CONCLUSION	34

TABLE OF AUTHORITIES

CASES	PAGE
Anderson v. Commissioner, 250 F.2d 242 (5th Cir. 1957) . .	24
Better Beverages, Inc. v. United States, 619 F.2d 424, reh'g denied, 625 F.2d 1160 (5th Cir. 1980)	27
Bittner v. Borne Chemical Company, Inc., 691 F.2d 134 (3d Cir. 1982)	34
Bose Corporation v. Consumer's Union of the United States, Inc., 52 U.S.L.W. 3513 (April 30, 1984)	17,30, 35
Busch v. Commissioner, 728 F.2d 945 (7th Cir. 1984)	17,34
Byram v. United States, 705 F.2d 1418 (5th Cir. 1983) . .	34
Chicago Title Insurance Company v. Sherred Village Associates, 708 F.2d 804 (1st Cir. 1983)	33
DeMarco v. United States, 415 U.S. 449 (1974)	19,32, 33

Inwood Laboratories v. Ives Laboratories, 456 U.S. 858 (1952) 29,33, 35

Lyddan v. United States, 721 F.2d 873 (2d Cir. 1983) . 33,34

Malat v. Riddle, 383 U.S. 569 (1966) 20

Markham & Brown, Inc. v. United States, 648 F.2d 1043 (5th Cir. 1981) 26,27

Midlantic National Bank v. Commissioner, 52 T.C.M. (P-H) 1983-581 (1983) 32

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 29

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 17,23, 28,29, 33,35

Robino v. Norton, 682 F.2d 192 (8th Cir. 1982) 34

Sisto Financial Corporation v. Commissioner, 149 F.2d 268 (2d Cir. 1945) 24

Southern Bancorporation, Inc. v. United States, 732 F.2d 374 (4th Cir. 1984) 1

Trout v. Lehman, 702 F.2d 1094 (D.C. Cir. 1983), vacated, 79 L.Ed.2d 732 (1984) 33

Zenith Radio Corp. v. Hazeltine Research, Inc., 295 U.S. 100 (1969) 20

STATUTES AND REGULATIONS

26 U.S.C. § 7422 5

26 U.S.C. § 6214 18

28 U.S.C. § 1254 2

28 U.S.C. § 1346(a) 6

Fed. R. Civ. P. 52(a) 7 12, 14,15, 19,23, 24,28, 29,30, 33,35

MISCELLANEOUS

Burger, Isn't There a Better Way?, 68 A.B.A.J. 274 (1982) 20

Want, The Caseload Monster in the Federal Courts, 69 A.B.A.J. 613 (1983) 21

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SOUTHERN BANCORPORATION, INC.
AND ITS SUBSIDIARIES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Certiorari To The United States Court of Appeals For The Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals is officially reported as Southern Bancorporation, Inc. v. United States, 732 F.2d 374 (4th Cir. 1984),

and is reproduced in Appendix A at pages A-1 through A-22.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 17, 1984. (A-72) A Petition for Rehearing and En Banc Consideration was denied on May 30, 1984. (A-74) This Petition for Certiorari was filed within 90 days of the date on which the Petition for Rehearing was denied.

The Court's jurisdiction is conferred under 28 U.S.C. § 1254.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 52(a) of the Federal Rules of Civil Procedure provides:

> Rule 52. Findings by the Court.
>
> (a) Effect. In all actions tried upon the facts without a

jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions, the Court shall singularly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a

master, to the extent that the Court adopts them, shall be considered as the findings of the Court. If an opinion or memorandum of decision is filed, it shall be sufficient if the findings of fact and conclusions of law appear therein.

STATEMENT OF THE CASE

Petitioner is Southern Bancorporation, Inc., a South Carolina corporation, and its wholly owned subsidiaries (herein called "Southern"). Petitioner requests that the Court set aside the reversal by the Court of Appeals for the Fourth Circuit of a decision by the United States District Court for the District of South Carolina in a federal income tax refund suit. Upon review of the decisions by the courts below, it will

be apparent that the Circuit Court ignored the record, the inferences drawn by the District Court from the record, the provisions of Rule 52(a) of the Federal Rules of Civil Procedure and the decisions of this Court and substituted its findings of fact for those found by the District Court. In ruling for the government the Circuit Court overlooked the absence of any evidence in support of the government's position and accepted the out of court assertions of an Internal Revenue Service agent over the findings of a United States district judge.

For the taxable year 1974, the Internal Revenue Service disallowed deductions claimed by Southern for the amortization of a loan portfolio. Southern paid the tax resulting from the disallowance of the deductions and,

pursuant to 26 U.S.C. § 7422, brought suit against the Respondent for the refund of that amount in the United States District Court for the District of South Carolina. Jurisdiction existed in the district court pursuant to 28 U.S.C. § 1346(a).

The deduction at issue in the tax refund case related to Southern's acquisition of certain assets of a failed South Carolina bank ("ABT") by assuming some of its liabilities. Among the assets acquired were a loan portfolio and the deposit relationships with the remaining customers of ABT who had not been frightened by the publicity of the bank failure. The purchase was made from the Federal Deposit Insurance Corporation ("FDIC") as liquidator of the assets of ABT. (A-3, A-28--A-30)

Except as to $5,560,000, the parties stipulated before trial to the allocation of a lump sum purchase price paid by Southern for the assets of ABT. (A-47--A-48) The only issue to be decided by the District Court was whether, as contended by Southern, the purchased loan portfolio had a basis for federal income tax purposes of $4,993,940 and $566,060 was allocable to nonamortizable assets. The government claimed that all of this amount was allocable to the "goodwill" or going concern value of the failed bank.

After considering the evidence presented at a two day bench trial, including the testimony of witnesses, the exhibits introduced, the partial stipulation of facts and the argument of the parties, the District Court made extensive findings of fact as to the

background of the acquisition of the failed bank, the manner in which the purchase price had been calculated and the method by which the loans had been valued and their useful lives determined. (A-27--A-64) The District court found as the ultimate fact that the tax basis of the loan portfolio was in the amount claimed by Southern. (A-56, A-60)

The District Court's evaluation of the evidence offered took into account the government's presentation of its case. As to the government's case, the District court stated, "the Defendant presented no evidence or calculations challenging the valuation technique for the commercial loans, relying instead on argument of counsel to attack the evaluation process." (A-55) Similarly,

no evidence was presented by the government to contradict the valuation method used by Southern for the installment loans. (A-58)

The government brought forward only one witness, who was not retained or prepared to speak to the issues being litigated. Rather, he testified to the hypothetical value of a hypothetical operating bank, ignoring the value of the asset at issue--the loan portfolio of a failed bank. The District Court apparently discounted the testimony of the government's expert as not being relevant.[1/]

Also, the the District Court stated that it had considered the

---

[1/] On appeal, the government did not rely on its expert's testimony to support its case.

argument of government counsel relating to purported defects in the method by which the loans had been valued by Southern. However, the District Court found that the testimony of Southern's witnesses established that the valuation process used by Southern did not have the defects alleged by the government. (A-59)

The District Court also made specific findings that the testimony of Southern's witnesses was credible. The opinion testimony was found to be reasonable and by persons with expertise in the area. (A-53, A-55, A-59) Based upon the underlying facts established by Southern, the District Court concluded that Southern had met its burden of proof in establishing that the value of the assets acquired were separable from

the values of any nondepreciable assets that may have been present, such as goodwill or "going concern" value. (A-67) Included within this finding was the District Court's determination that the quantum of proof adduced by Southern accounted for the fact that the purchase agreement between Southern and the FDIC did not provide for a specific allocation of the purchase price amount that was in dispute. The ultimate fact found by the District Court was that the tax basis of the loan portfolio was the amount used by Southern in preparing its income tax return. (A-70-A-71) The District Court, therefore, awarded the refund sought.

The government appealed the adverse decision to the Fourth Circuit Court of Appeals. The Court of Appeals

reversed the judgment of the District Court and ordered that judgment be entered for the government without any further proceedings by the District Court.

The opinion of the Fourth Circuit does not acknowledge that its review was restricted by Rule 52(a) of the Federal Rules of Civil Procedure (hereinafter referred to as Rule 52(a)). The opinion further evidences that the Circuit Court proceeded to make its own factual findings--findings which were completely contrary to those made by the District Court. At no time did the Fourth Circuit state any reason why the findings of the District Court were clearly erroneous. Nor did the Circuit Court explain what, if any, legal error had been made by the District Court.

Specifically rejected by the Court of Appeals was the District Court's findings as to the credibility of witnesses and the reasonableness and validity of the opinion testimony presented. Additionally, without explanation as to the basis for its conclusion and without any citation to the record, the Fourth Circuit characterized the deductions claimed by Southern as "approaching fraud" (A-3) and the act of their accountants as "aiding and abetting" (A-10).

The Fourth Circuit appears to premise its reversal of the findings of the District Court on its view that Southern had failed to meet the burden of proof required to sustain the allowance of the deduction. (A-21) The Circuit Court did not allocate the amount at issue to any other asset; nor

did that court remand the matter to the District Court for further findings of fact. (A-22)

Southern requested a rehearing and en banc consideration, which was denied by the Fourth Circuit. (A-74)

ARGUMENT

I.

THE DECISION OF THE FOURTH CIRCUIT THREATENS THE ROLE OF THE DISTRICT COURT AS THE JUDGE OF THE CREDIBILITY OF WITNESSES AND THE WEIGHT OF THE EVIDENCE.

The federal judicial system is structured so that fact-finding is the basic responsibility of district courts, rather than appellate courts. The requirement of Rule 52(a) that deference be given to the factual findings of a district court, unless shown to be clearly erroneous, embodies this role of the district court as the fact finder.

The decision of the Fourth Circuit discounted and effectively eliminated the role of the trier of fact as the judge of the credibility of witnesses and the weight of the evidence. In doing so, the Court of Appeals completely disregarded both the command and the policy underlying Rule 52(a). This disregard of Rule 52(a) was without even a purported attempt to show that a legal error had been made by the District Court or that the factual findings were clearly erroneous.

When the Court of Appeals cast the actions of Southern arising in the context of an ordinary civil tax dispute in such perjorative terms as "bordering on fraud" and those of its accounting firm as "aiding and abetting", that court directly usurped the role of the

District Court in judging the credibility of witnesses. (A-3)

The District Court had made specific findings that Southern's evidence was credible and reasonable. (A-55, A-61) This finding applied both to the testimony presented by witnesses for Southern as to the background of the acquisition of the ABT assets and how the income tax deduction was computed. At no time during the trial did the government assert that there had been any wrongdoing on the part of Southern. Yet, the entire tenor of the Fourth Circuit's opinion is that Southern knowingly claimed an improper deduction. In order for the Fourth Circuit to have reached such a conclusion, the Court of Appeals would have to have made its own finding as to Southern's intent when it calculated the

deductions at issue and filed its tax return. State of mind determinations are generally left to the trier of fact with only deferential appellate review.[2/] Pullman-Standard v. Swint, 456 U.S. 273, 288-289 (1982); Busch v. Commissioner, 728 F.2d 945, 949 (7th Cir. 1984).

Additionally, the Fourth Circuit rejected, without stating a reason, the weight given to the evidence by the trial court. The Court of Appeals held that the government should prevail, not based on the evidence it presented, but

---

[2/] The issue of the amortization of an intangible asset, such as the loans, does not normally raise questions of intent. To the extent a question of intent was relevant to the allowability of the deduction at issue, it clearly does not rise to the level of a "constitutional fact question" as was presented in Bose Corporation v. Consumer's Union of the United States, Inc., 52 U.S.L.W. 3513 (April 30, 1984).

because of the initial presumption of correctness attaching to an assertion by the Internal Revenue Service. The Fourth Circuit, thus, gave more credence and weight to the conclusion of an Internal Revenue Service agent, who initially established the position of the government, than to the findings of a United States district judge who heard and reviewed the evidence.

The conclusion of the Service relied upon by the Fourth Circuit was not an adjudicatory determination. Rather, the Service's position was merely the agent's assertion of additional liability based on his view of the facts and the law, as reflected in the statutory notice of deficiency issued by the Service. See 26 U.S.C. § 6214. At no time prior to the position

of the Service being established was any impartial consideration given to the positions taken by Southern, as the taxpayer, and the Service, as the tax collector.

Accordingly, if unreviewed by this Court, the decision of the Fourth Circuit will stand as a repudiation of prior holdings by this Court and of the policies upon which Rule 52(a) is based. Such a repudiation will harm the judicial system by undermining its efficiency and distorting the roles of the trial and appellate courts.

The decision of the Fourth Circuit poses a threat to the efficiency of the federal court system. The district courts have a unique place in the system as the finders of fact. DeMarco v. United States, 415 U.S. 449, 450 (1974);

Malat v. Riddle, 383 U.S. 569, 572 (1966); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).

If unreviewed by this Court, the Fourth Circuit's decision will stand as an invitation to the losing litigant to prolong the process by the appeal of a factual issue. The Chief Justice has noted that there already exists a trend whereby "people tend to be less satisfied with one round of litigation and are demanding a 'second bite at the apple' far more often than in earlier times." Burger, Isn't There a Better Way? 68 A.B.A.J. 274, 275 (1982). The decision of the Fourth Circuit will exacerbate this trend and increase the burden on a federal court system which already labors under an ever increasing

workload. Want, The Caseload Monster in the Federal Courts, 69 A.B.A.J. 613 (1983).

Also harmed are those persons who must litigate factual questions. An appellate court does not have the opportunity to view the demeanor and forthrightness of the witnesses. On appeal, the losing party below, through argument of counsel, can obfuscate the testimony through emphasis upon certain words and phrases out of context. The result is that testimony may be perceived by an appellate court differently from how it was actually conveyed before the trial court. A written transcript does not convey to the reader the intonation given to words and the nonverbal communication that can be observed by the trial court. Such

observations become a part of the trial judge's memory and, therefore, are a part of his or her evaluation of the case. The judges of the Court of Appeals do not have before them this unique aspect of the record. It is the lack of opportunity of an appellate court to see and hear witnesses that underlies the rule that deference is to be given to the factual findings of the trier of fact. If an appellate court is permitted to make forays into the domain of the district court by rejudging the credibility of witnesses, the litigants have effectively been denied the right to an adequate trial at which their witnesses may be seen and heard.

II.

THE DECISION OF THE FOURTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

This Court has previously held that all factual findings, including those of ultimate fact, are subject to review under Rule 52(a) and any further factual questions to dispose of the issue are to be made by a district court on remand. Pullman-Standard, 456 U.S. at 287. The decision of the Fourth Circuit in this matter and its disposition of the case is in direct conflict with the holdings in Pullman-Standard.

The ultimate issue in the case decided by the Fourth Circuit was the fair market value of an asset for federal income tax purposes. The

question of fair market value is purely factual. Anderson v. Commissioner, 250 F.2d 242, 249 (5th Cir. 1957); Sisto Financial Corporation v. Commissioner, 149 F.2d 268, 269 (2d Cir. 1945).

The District Court made a finding as to the amount of that value. In its answering brief to the government's appeal, Southern urged that the findings of the District Court were subject to review under the standards of Rule 52(a). Without ever acknowledging Rule 52(a) or its principles, the Fourth Circuit rejected the factual findings of the District Court and substituted its own view of the evidence, both as to the ultimate fact, the income tax basis of the loans, and at least three other specific findings by the District Court. The Court of Appeals overturned

the findings of the District Court without giving any explanation as to why the District Court's determinations were faulty.

One instance is when the District Court found the evidence presented by Southern to be credible. In contrast, the Fourth Circuit impugned the veracity of Southern and its witnesses by characterizing their conduct as "approaching fraud."

Secondly, the District Court found that, at the time Southern calculated its bid:

> they believed that the loan portfolio to be obtained in the transaction was more valuable than its face amount of $40,974,953 because they thought that the quality of the commercial loans was high; the yield on both commercial and installment loans was higher than Southern was then achieving on loans it had in its existing loan portfolio; and the loans could be acquired without

> the related costs for underwriting and originating the loans." (A-51--A-52)

Disregarding this finding and inserting its own view of the evidence, the Court of Appeals found that "SBC [Southern] did not, in any event, evaluate the quality of loans prior to purchasing them." (A-17)

Additionally, the Fourth Circuit says that Southern failed in its case because sufficient evidence was not presented to sustain the value of the loan portfolio. In the Fourth Circuit's view, Southern had a greater burden of proof than would normally be required because the purchase agreement with the FDIC did not allocate the amount at issue to the loans.[3/] In evaluating

---

[3/] The cases relied upon by the Fourth Circuit were Markham & Brown,

[Footnote continued on next page]

whether Southern had satisfied its burden of proof, the District Court had made specific reference to the fact that it was considering a case where the purchase agreement did not contain the allocation urged by the taxpayer. (A-67) Thus, the holding of the Fourth Circuit was merely a substitution of its view of the weight of the evidence for that which had been found by the District Court.

[Footnote 3 continued]

Inc. v. United States, 648 F.2d 1043, 1046 (5th Cir. 1981); Better Beverages, Inc. v. United States, 619 F.2d 424, 429-430, reh'g denied, 625 F.2d 1160 (5th Cir. 1980) (A-16) Those decisions were not analogous since they involved whether part of a lump sum amount was paid for a covenant not to compete when there was no evidence that the parties negotiated to pay any value for such an undertaking.

These examples evidence the disregard of Rule 52(a) by the Court of Appeals. Such action is clearly contrary to the decisions of this Court and those of other Circuits.

In Pullman-Standard, this Court laid to rest the then existing uncertainty as to whether Rule 52(a) applied to all factual findings, even those of "ultimate" facts. Unequivocally, this Court stated:

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a District Court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

456 U.S. at 287.

Additionally, this Court has cautioned appellate courts that in reversing factual findings of district courts, they should identify the evidentiary basis for any particular error of the district court. Inwood Laboratories v. Ives Laboratories, 456 U.S. 858, n. 20 (1982). That admonition was not followed by the Fourth Circuit.

As the Fourth Circuit's action in this case completely disregarded this Court's prior holdings, the principles of Rule 52(a) are apparently not clear to all appellate court judges.[4/] A

[4/] This Court's most recent interpretation of Rule 52(a) in the context of the required "actual malice" findings for New York Times Co. v. Sullivan, 376 U.S. 254 (1964), does not depart from the adherence to Rule 52(a) mandated by Pullman-Standard and Inwood Laboratories. The majority opinion in Bose

[Footnote continued on next page]

review of this case offers the opportunity to again define and reinforce the respective roles of the trier of fact and the appellate court and to dispel the remaining uncertainty as to how Rule 52(a) is to be applied.

The Fourth Circuit also ignored the rulings of this Court when it ordered that a judgment be entered for the government without further proceedings by the District Court. This case illustrates the procedural problems and the duplicative litigation that can result from such a failure.

[Footnote 4 continued]

limited the role of the appellate court as the independent reviewer of the facts to those cases involving First Amendment rights for which a constitutional responsibility cannot be delegated to the trier of fact. Bose, 52 U.S.L.W. at 4517.

When the Court of Appeals held that Southern was not entitled to the amortization deduction for the year at issue because it failed to carry its burden of proof, that holding did not completely resolve the controversy. While the Fourth Circuit held that the purchase price at issue ($5,560,000) could not be attributed to the loan portfolio, it did not specify how this amount was to be treated for federal income tax purposes.[5/]

[5/] Based on the stipulation of the parties, the purchase price at issue could only be attributed to either the deposit relationships with the customers of the failed bank or to going concern value. It is established, and recognized by Southern, that going concern value is a nonamortizable asset. However, deposit relationships are amortizable for tax purposes.

[Footnote continued on next page]

Usually, when a Court of Appeals has found the record to be missing a finding on a dispositive point or when findings are infirm because of an erroneous view of the law, a remand to the District Court should be made because:

> Fact finding is the basic responsibility of district courts, rather than appellate courts and, . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.

[Footnote 5 continued]

Midlantic National Bank v. Commissioner, 52 T.C.M. (P-H) 1983-581 (1983). In order to obtain an answer to the question not answered by the Fourth Circuit, Southern, as to other tax years that are affected, is being required to seek a further determination as to the proper tax treatment. A proceeding is now pending in the United States Tax Court on this question as to years not in issue before the District Court.

DeMarco, 415 U.S. at 450, n*. While the necessity of a remand should have been an accepted procedure, the Fourth Circuit did not adhere to this rule.

Consistent with the principles enunciated in Pullman-Standard and Inwood, other circuit courts have adhered to the requirements of Rule 52(a). The following decisions, involving like situations of extensive factual findings by the District Court, correctly held that Rule 52(a) required that deference be given to the factual findings of the district court. Trout v. Lehman, 702 F.2d 1094, 1100 (D.C. Cir. 1983), vacated, 79 L.E.2d 732 (1984); Chicago Title Insurance Company v. Sherred Village Associates, 708 F.2d 804, 810 (1st Cir. 1983); Lyddan v.

United States, 721 F.2d 873, 875 (2d Cir. 1983); Bittner v. Borne Chemical Company, Inc., 691 F.2d 134, 138 (3d Cir. 1982); Byram v. United States, 705 F.2d 1418, 1422-1423 (5th Cir. 1983); Busch, 728 F.2d at 949; Robino v. Norton, 682 F.2d 192, 195 (8th Cir. 1982). Similarly, other circuit courts have correctly recognized that "[u]nder the clearly erroneous standard, we [the court of appeals] cannot reweigh the evidence." Busch, 728 F.2d at 951. The decision of the Fourth Circuit in this matter is clearly in conflict with those decisions. The Fourth Circuit gave no deference to the District Court's factual findings or to the weight accorded the evidence by that court.

CONCLUSION

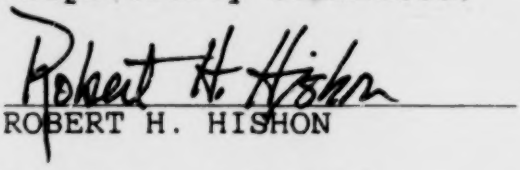
The significance of this case reaches much beyond a tax dispute. It

is the integrity of the federal judicial system and the role of a district court as the finder of fact which requires consideration by this Court. If the Fourth Circuit's opinion remains unreviewed, it will stand as an open invitation for increased use of the appellate courts to relitigate factual issues. Such a result is contrary to all efforts now being made to relieve the overcrowing of the federal court system.

Further, the decision below is clearly in conflict with the holdings of this Court in Pullman-Standard, Inwood Laboratories, and Bose.

A writ of certiorari should, therefore, be granted to review, and ultimately reverse, the decision below.

Respectfully submitted,



ROBERT H. HISHON

Attorney of Record

Of Counsel:

Bondurant, Miller, Hishon & Stephenson
2200 First Atlanta Tower
Two Peachtree Street, N.W.
Atlanta, Georgia 30383-4501
(404) 581-5200

Haynesworth, Perry, Bryant, Marion & Johnstone
409 East North Street
Greenville, South Carolina 29602
(803) 271-7970

2481f